

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

STEVEN COHEN,

Case No.: 2:19-cv-01033-APG-EJY

Plaintiff

Order

v.

[ECF Nos. 26, 30, 42, 52, 53, 54, 60]

RICHARD WHITLEY, et al.,

Defendants

Plaintiff Steven Cohen brings this disability discrimination action against three defendants: the Nevada Department of Employment, Training, and Rehabilitation – Bureau of Vocational Rehabilitation (DETR)¹; the Nevada Department of Health and Human Services – Division of Health Care Financing and Policy (DHHS); and the Nevada Department of Administration – Division of Human Resource Management (DOA).² Cohen alleges that he has autism spectrum disorder (formerly Asperger’s syndrome) and contends that his employer, DHHS, discriminated against him by denying him reasonable accommodation to use a tape recorder and by firing him because of his disability. He also alleges that DETR prematurely closed his vocational rehabilitation services case, which resulted in him not having access to employment counseling for his dispute with DHHS.

¹ Cohen sues the bureaus and divisions within the Nevada departments. But for clarity, I will refer to the defendants as the departments unless the division is relevant.

² These are the remaining defendants in this action. Defendants Richard Whitley, Deborah Bierman, Cody Phinney, Tammy Moffitt, Heather Lazarakis, Marcel Brown, Emily Kuhlman, the U.S. Department of Health and Human Services, the U.S. Equal Employment Opportunity Commission (EEOC), the U.S. Rehabilitation Services Administration, the Nevada Equal Rights Commission, and the Bureau of Employment Security within DETR were terminated when Cohen did not include them in his amended complaints. ECF Nos. 6, 10, 19.

1 Cohen sues the defendants under Title I of the Americans with Disabilities Act (ADA),
 2 the Rehabilitation Act, Nevada's anti-discrimination statute, and the Due Process Clause and
 3 Equal Protection Clauses of the Fourteenth Amendment. DETR and DOA move to dismiss,
 4 arguing that the Eleventh Amendment bars the claims, that qualified immunity applies, and that
 5 Cohen failed to state any claims upon which relief can be granted. In the alternative, they move
 6 to strike Cohen's fourth amended complaint for lack of a signature. DHHS separately moves to
 7 dismiss for insufficient service of process and because it contends that an administrative hearing
 8 has a preclusive effect on Cohen's claims. Cohen moves for leave to amend his complaint to
 9 remedy the lack of signature and to add more information. He also moves for status checks and
 10 for an expedited briefing or trial schedule.

11 I deny Cohen's motions for status checks as moot. I grant DETR and DOA's motion to
 12 strike Cohen's fourth amended complaint because it lacks a signature. I deny Cohen's motion
 13 for leave to amend with his proposed fifth amended complaint because it is futile, but I grant him
 14 leave to amend some claims with a new complaint. Cohen has had multiple opportunities to
 15 amend, so if he chooses to file a new complaint he must cure the deficiencies or I will dismiss it
 16 without leave to amend. I deny Cohen's motion for an expedited briefing or trial schedule.

17 **I. BACKGROUND³**

18 The Bureau of Vocational Rehabilitation (BVR), a bureau within DETR, provides
 19 employment assistance to individuals with disabilities as part of the vocational rehabilitation
 20 services program, and Cohen has been a client for several years. ECF No. 28 at 2. In part, these
 21 services involve developing individualized plans for employment (IPE) for its clients. *Id.* When
 22

23 ³ This section is based on the facts alleged in Cohen's proposed fifth amended complaint. ECF
 No. 28.

1 clients are employed for at least 90 days as part of their IPEs and other requirements are met,
2 client cases may be closed but can be reopened in post-employment status to assist clients in
3 dealing with issues with their employers. *Id.* This assistance may include helping clients
4 understand why their jobs may be at risk and teaching them proper workplace behaviors. *Id.* In
5 June 2017, Cohen was assigned a new vocational rehabilitation counselor, Stephen Icamen, who
6 opened a new case for Cohen to help him obtain an entry-level accounting position. *Id.* at 3.

7 In mid-November 2017, Cohen got in a dispute with Icamen after Cohen inquired about a
8 job vacancy within DETR. *Id.* This dispute was never resolved. *Id.* On February 12, 2018,
9 Cohen was hired by the Division of Health Care Financing and Policy (DHCFP), a division
10 within DHHS, as an administrative assistant. *Id.* On February 27, DETR closed Cohen's
11 vocational services case even though he had not achieved his stated employment outcome yet. *Id.*
12 Because the case was closed prematurely, Cohen was not eligible to use BVR's post-
13 employment services to assist him with his subsequent issues with DHCFP. *Id.*

14 Cohen was hired by DHCFP through the 700 Hour Program, a program designed to
15 increase the number of persons with disabilities in the State workforce by establishing 700-hour
16 appointments. *Id.* at 4. BVR recommends eligible candidates to Nevada's human resources
17 division (DHRM) within the Department of Administration and the DHRM codes them as
18 priority candidates for certain state jobs. *Id.* In June 2018, Cohen completed his 700 hours with
19 DHCFP and it then opted to continue his employment on a probationary basis. *Id.* Cohen
20 received two satisfactory performance evaluations in April and August. *Id.* But on September
21 14, he received negative feedback because he was instructing another assistant on her duties,
22 which was beyond the scope of his job. *Id.* On October 29, Cohen again received negative
23 feedback for going beyond his job scope after he sent a reminder e-mail to the team. *Id.* at 5.

1 On that same day, Cohen told his immediate supervisor, Marcel Brown, about his autism.
2 *Id.* For the following month of November, Cohen sent DHCFP multiple revised memos
3 requesting several accommodations. *Id.* One of his requested accommodations was for a tape
4 recorder because he was required to take meeting minutes and his autism made it challenging to
5 process information at a normal rate, to identify voices, and to articulate conversations verbatim.
6 *Id.* at 5, 22. In response to Cohen's accommodation requests, DHCFP sent Cohen a medical
7 inquiry form, which was completed. *Id.* at 5. Around this time, Cohen also sought post-
8 employment services from BVR to assist him with DHCFP, but he learned that his case had been
9 closed. *Id.* Because it was closed, Cohen had to create a new case with BVR and he was unable
10 to get assistance until February 2019. *Id.*

11 On November 29, 2018, Brown issued Cohen a letter of instruction, which documented
12 the negative feedback they had discussed and laid out work expectations going forward. *Id.* at 6,
13 31. Although Cohen's complaint characterizes the letter as documenting only the previous two
14 incidents, the letter (which Cohen attached to his proposed fifth amended complaint) discussed
15 additional incidents after October where Cohen went beyond the scope of his job. *Id.* at 6, 31.

16 On December 11, Cohen submitted an inquiry to the EEOC about DHHS for disability
17 discrimination and retaliation, although he did not specify the basis for these allegations. *Id.* at 6,
18 15. On December 21, DHCFP granted some of Cohen's accommodation requests, including
19 more time to complete the meeting minutes, but denied his request for a tape recorder. *Id.* at 5,
20 19. On December 26, Cohen responded to DHCFP's denial of his tape recorder request in order
21 "to continue the interactive process." *Id.* at 6.

22 On January 2, 2019, Cohen was terminated. *Id.* Cohen contends that "other employees
23 similarly situated had reasonable accommodations negotiated in good faith and/or were retained

subsequent to that date” and that DHCFF’s failure to negotiate with him and decision to fire him amounts to “disparate treatment and impact discrimination.” *Id.* Because Cohen was terminated before the end of his probationary period, he alleges he had “no legally permissible appellate relief . . . to more expeditiously have remedied the wrongful termination.” *Id.*

Cohen challenged his dismissal under Nevada’s whistleblower law before a Nevada State Personnel Commission hearing officer. ECF Nos. 28 at 6; 42 at 16.⁴ On January 6, 2019, the hearing officer dismissed his claim, determining that Cohen had not set out the facts and circumstances of his whistleblower claim. ECF No. 42 at 17-18. On March 1, the EEOC interviewed Cohen in response to his inquiry. ECF No. 28 at 6. Cohen then made a formal charge and the EEOC provided him a right to sue letter. *Id.* at 6, 12.

Acting pro se, Cohen filed the original complaint for this action on June 17, 2019. ECF No. 1. His original complaint and first amended complaint were screened and dismissed with leave to amend. ECF Nos. 4, 9. Cohen filed a second amended complaint. ECF No. 10. He subsequently filed a “Third Amended Emergency Petitions for Writs of Mandamus and/or Prohibition,” which I denied. ECF Nos. 13; 18 at 2-3. Cohen then filed his “Fourth Amended Petition for Judicial Review/Complaint/Writs of Mandamus and/or Prohibition,” which alleges

⁴ Although Cohen did not attach the Nevada State Personnel Commission dismissal order to his complaint, DHHS attached it to its motion to dismiss. ECF No. 42 at 16. I typically cannot consider exhibits outside of a complaint at the motion to dismiss stage without converting the motion into one for summary judgment, but the incorporation by reference doctrine allows me to treat certain documents as if they were originally attached to the complaint. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018). The doctrine applies when a plaintiff’s complaint discusses the contents of a document without attaching it and no party questions its authenticity. *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1117 (9th Cir. 2018). The Nevada State Personnel Commission dismissal is incorporated by reference because Cohen discusses the dismissal in both the fourth and fifth amended complaints. ECF Nos. 19 at 7; 28 at 6. He also does not challenge its authenticity and he provided the same document in a different motion. ECF No. 59-1 at 2-5.

1 claims under Title I of the ADA, Nevada’s anti-discrimination law, the federal Rehabilitation
2 Act, and the Fourteenth Amendment. ECF No. 19.

3 DETR and DOA moved to dismiss or strike ECF No. 19, which DHHS joined. ECF Nos.
4 26, 43. DHHS also filed a separate motion to dismiss, which the other defendants joined, for
5 insufficient service of process and failure to state a claim. ECF Nos. 42, 44. Cohen filed a
6 motion for leave to amend to add a missing signature and to update information. ECF No. 30 at
7 2. Cohen also filed two motions for status checks and a motion for expedited briefing and/or
8 trial schedule. ECF Nos. 52, 53, 54.

9 II. ANALYSIS

10 Federal Rule of Civil Procedure 8(a)(2) requires a plaintiff to plead a “short and plain
11 statement of the claim showing that the pleader is entitled to relief.” For a motion to dismiss
12 under Rule 12(b)(6), I apply a two-step process to determine whether a party has stated a claim.
13 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). First, I must accept as true all the
14 complaint’s allegations and draw all reasonable inferences in the plaintiff’s favor. *Ashcroft v.*
15 *Iqbal*, 556 U.S. 662, 678 (2009). Legal conclusions and “mere conclusory statements” are not
16 entitled to an assumption of truth. *Id.* at 678-79. Second, I must determine whether the
17 complaint’s factual allegations put forward a plausible claim for relief. *Id.* at 679. This is a
18 context-specific determination that requires drawing on my judicial experience and common
19 sense. *Id.* at 679. Complaints by pro se litigants should be construed liberally, but they must still
20 comply with the rules of procedure. *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995).

21 Under Rule 12(f), I may grant a motion to strike a pleading if it has redundant,
22 immaterial, impertinent, or scandalous matters. Additionally, I “must strike an unsigned paper”
23

1 unless it is promptly corrected. Fed. R. Civ. P. 11(a); *see also* LR IC 7-1 (“The [C]ourt may
2 strike documents that do not comply with these rules.”).

3 **A. The Operative Complaint**

4 Cohen’s naming and filing of documents has led to some confusion so I will clarify the
5 docket. The document Cohen filed as ECF No. 19 is titled “Fourth Amended Petition for
6 Judicial Review/Complaint/Writs of Mandamus and/or Prohibition.” Although stylized as a
7 motion, ECF No. 19 appears to be an unauthorized amended complaint. All the parties treat ECF
8 No. 19 as Cohen’s operative complaint. Cohen included “Complaint” in the title of ECF No. 19
9 and he refers to it as his “Fourth Amended Complaint” in his motion for leave to amend. ECF
10 No. 30 at 2. The defendants also base their motions to dismiss on ECF No. 19 rather than
11 Cohen’s second amended complaint.⁵ So although Cohen filed ECF No. 19 without leave, I will
12 treat it as the operative complaint and will refer to it as the “fourth amended complaint.”
13 Because that is the operative complaint, it supersedes Cohen’s second amended complaint.
14 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992), *as amended* (May 22, 1992) (noting that
15 a superseded complaint is “treated thereafter as non-existent”).

16 Cohen also filed ECF No. 28, which is titled “Signed Fourth or Fifth Amended Petition
17 for Judicial Review/Complaint/Writs of Mandamus and/or Prohibition.” This is not intended to
18 be a new operative complaint but is rather his proposed fifth amended complaint filed
19 prematurely. ECF No. 30 at 4 (referencing ECF No. 28 as his proposed amended complaint for
20 his countermotion for leave to amend).

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22
23 ⁵ There is no third amended complaint. After filing his second amended complaint, Cohen
labeled ECF No. 13 as “Third Amended Emergency Petitions for Writs of Mandamus and/or
Prohibition.” ECF No. 19 continues that numbering.

1 **B. Motion to Strike Fourth Amended Complaint (ECF No. 26)**

2 Rule 11(a) requires that every pleading be personally signed by a party who is
3 unrepresented. *See also* LR IC 5-1(b) (“The signatory must be the attorney or pro se party who
4 electronically files the document.”). The defendants move to strike Cohen’s fourth amended
5 complaint because it was not signed. Cohen admits it was an oversight and requests leave to
6 amend to fix it, noting that he “promptly corrected” it by filing his fifth amended complaint with
7 a signature. ECF No. 29 at 7.

8 I grant the defendants’ motion to strike Cohen’s fourth amended complaint because it is
9 not signed. Although Cohen filed the signed fifth amended complaint, it contains several other
10 differences from the fourth amended complaint, so it is not the same document. Because I grant
11 the motion to strike, I deny as moot the defendants’ motions to dismiss the fourth amended
12 complaint.

13 **C. Motion for Leave to Amend (ECF No. 30)**

14 Leave to amend a complaint “shall be freely given when justice so requires.” Fed. R. Civ.
15 P. 15(a)(2). But I may deny leave to amend when there is “undue delay, bad faith or dilatory
16 motive on the part of the movant, repeated failure to cure deficiencies by amendments previously
17 allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and]
18 futility of amendment.” *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008)
19 (internal quotations and citations omitted). Amendment is futile if “it is clear, upon de novo
20 review, that the complaint could not be saved by any amendment.” *Id.* (quoting *Polich v.*

1 *Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991)). Cohen moves for leave to amend with
 2 his proposed fifth amended complaint to include a signature and to add more information.⁶

3 The defendants argue that Cohen should be denied leave to amend because he has
 4 repeatedly failed to cure deficiencies in his previous amendments and amendment is futile
 5 because the defendants are entitled to sovereign immunity.⁷ Cohen responds that sovereign
 6 immunity does not apply and that leave should be granted liberally for pro se litigants.

7 Cohen's fifth amended complaint has several deficiencies so proceeding with it as is
 8 would be futile. I thus deny Cohen's motion for leave to amend with his proposed fifth amended
 9 complaint. However, I grant Cohen leave to amend his Title I ADA, Rehabilitation Act, and due
 10 process claims with a new complaint if he can remedy the defects I identify in this order. I do
 11 not give him leave to amend his state law claims because amendment would be futile.

12 1. Eleventh Amendment Sovereign Immunity

13 Under the Eleventh Amendment, states are immune from suit in federal court unless there
 14 is valid congressional abrogation or state waiver. *Dittman v. California*, 191 F.3d 1020, 1025
 15 (9th Cir. 1999). This immunity applies to both federal and state law claims. *Pennhurst State Sch.*
 16 *& Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). Arms of the state, such as state agencies, are
 17 also entitled to sovereign immunity. *Id.* Congress abrogates state sovereign immunity if it has
 18 "unequivocally expressed its intent to abrogate the immunity" and when it acts "pursuant to a
 19 valid exercise of power." *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 55 (1996) (internal

20
 21 ⁶ Local Rule 15-1 requires a party to attach the proposed amended pleading to the motion for
 22 leave to amend. But because Cohen is pro se, I will consider his motion as if he had attached his
 23 proposed fifth amended complaint to the motion (rather than filing it separately on the docket).

⁷ The motions to dismiss are technically mooted. But because the fourth amended complaint and
 proposed fifth amended complaint have substantially similar allegations and claims, I have
 considered the arguments in the motions to dismiss in determining futility of the proposed fifth
 amended complaint.

1 quotations and citations omitted). A state may also waive its sovereign immunity expressly or
2 when it voluntarily invokes the federal court’s jurisdiction. *Coll. Sav. Bank v. Fla. Prepaid*
3 *Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999); *Lapides v. Bd. of Regents of Univ.*
4 *Sys. of Ga.*, 535 U.S. 613, 614 (2002).

5 Under *Ex parte Young*, there are some circumstances in which a private party may sue a
6 state official instead of the state, so that the suit will not be treated as being against the state.
7 *Pennhurst*, 465 U.S. at 101–02 (citing *Ex parte Young*, 209 U.S. 123 (1908)). In general, a
8 federal court “may award injunctive relief in a suit against a state official, but it cannot award
9 retroactive monetary relief.” *Edelman v. Jordan*, 415 U.S. 651, 665 (1974). *Ex parte Young* does
10 not apply to state law claims, even if a state official is sued. *Pennhurst*, 465 U.S. at 106.

11 The defendants argue they are immune from suit under the Eleventh Amendment for the
12 ADA and due process/equal protection claims because they are arms of the state and Congress
13 has not abrogated that immunity. The defendants further argue that state agencies are not
14 “persons” for purposes of § 1983 claims. Cohen responds that Congress abrogated the state’s
15 immunity by adopting the ADA and including states as covered entities in its definition. He also
16 argues that a Nevada statute defines “person” to include the State of Nevada or any of its
17 political subdivisions.

18 The proposed fifth amended complaint sues only the divisions or departments of the state
19 of Nevada. As such, the defendants are arms of the state entitled to sovereign immunity.
20 Congress did not abrogate sovereign immunity in passing Title I of the ADA. *Bd. of Trustees of*
21 *Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001). Similarly, when Congress passed 42 U.S.C.
22 § 1983—the statute that provides the “federal forum to remedy many deprivations of civil
23 liberties” like due process claims—it did not abrogate sovereign immunity. *Will v. Mich. Dep’t*

1 of *State Police*, 491 U.S. 58, 66 (1989); *Quern v. Jordan*, 440 U.S. 332, 342 (1979).

2 Additionally, § 1983 cannot be used to sue states or state agencies because they are not
3 “persons” within the statute’s meaning. *Will*, 491 U.S. at 66.

4 Nevada has not waived its sovereign immunity in federal court. Nev. Rev. Stat.
5 § 41.031(3) (“The State of Nevada does not waive its immunity from suit conferred by
6 Amendment XI of the Constitution of the United States.”). This is not a removal case and there
7 is no other indication that the defendants voluntarily invoked federal court jurisdiction.

8 Because the defendants are arms of the state and there is no congressional abrogation or
9 state waiver, the defendants are entitled to sovereign immunity for claims under the ADA, state
10 law, and due process/equal protection clauses. Thus, the proposed fifth amended complaint, as
11 is, would be futile because sovereign immunity would bar those claims.

12 But it is not clear that all amendment would be futile. Under *Ex parte Young*, sovereign
13 immunity might not bar Cohen from suing state officials in their official capacities⁸ for his
14 requested injunctive relief⁹ of restoring his employment with DHC FP and granting his
15 accommodation request. See *Edelman*, 415 U.S. at 665. He also might not be barred from suing
16 state officials in their personal capacities for money damages for a § 1983 due process/equal
17 protection claim. See *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). But sovereign immunity
18 would still bar Cohen from seeking money damages, such as punitive damages or back pay,

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20 ⁸ “Personal-capacity suits seek to impose personal liability upon a government official for
21 actions he takes under color of state law. Official-capacity suits, in contrast, generally represent
22 only another way of pleading an action against an entity of which an officer is an agent.”
23 *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (internal quotations and citations omitted).

⁹ Cohen also requests “automatic amendment of [his] rate of pay from grade 25, step 01 to grade
25 step 03,” which is the alleged pay increase he would have achieved through continued
employment. ECF No. 28 at 9. It is unclear what this would apply to given that Cohen does not
appear to currently work for the state. *Id.* at 7 (explaining that he had been hired in Nevada’s
Division of State Parks but no longer works there).

1 against state officials in their official capacities and for state law claims regardless of how they
2 are pleaded. *Edelman*, 415 U.S. at 665; *Pennhurst*, 465 U.S. at 106.

3 Amendment would be futile for Cohen’s state law claims because they are barred by
4 sovereign immunity. But it is not clear that amendment would be futile for the ADA and due
5 process/equal protection claims so long as he sues state officials in a way that comports with *Ex*
6 *parte Young*.¹⁰

7 2. Effect of Administrative Hearing

8 An unreviewed state agency determination will be given preclusive effect if the agency
9 proceeding had enough safeguards to be equated with a state court judgment. *Miller v. Cnty. of*
10 *Santa Cruz*, 39 F.3d 1030, 1033 (9th Cir. 1994), *as amended* (Dec. 27, 1994). Under Nevada
11 law, res judicata applies to agency decisions when the agency acted in a “judicial capacity” and
12 the agency resolved disputed issues of fact, which the parties “had an adequate opportunity to
13 litigate.” *Holt v. Reg’l Tr. Servs. Corp.*, 266 P.3d 602, 605 (Nev. 2011) (quoting *United States v.*
14 *Utah Constr. Co.*, 384 U.S. 394, 421–22 (1966)). Res judicata bars a suit when (1) “the issue
15 decided in the prior adjudication was identical to the issue presented in the action in question;”
16 (2) “there was a final judgment on the merits;” and (3) “the party against whom the judgment is
17 asserted was a party, or in privity with a party to the prior adjudication.” *Britton v. City of N. Las*
18 *Vegas*, 799 P.2d 568, 569 (Nev. 1990).

19
20 ¹⁰ The defendants do not address Cohen’s Rehabilitation Act claim. When a state accepts
21 Rehabilitation Act funds, it waives its immunity from Section 504 of the Rehabilitation Act,
22 which deals with disability discrimination. *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th
23 Cir. 2003). However, Section 102 of the Rehabilitation Act, which deals with vocational
rehabilitation services, does not contain a similar express waiver provision. *Snell v. Vocational*
Rehab. State Unit Pers., No. 3:20-CV-00242-MO, 2020 WL 4506779, at *3 (D. Or. Aug. 5,
2020). As discussed below, Cohen has not specified what section he bases his Rehabilitation Act
claim on, so it is not clear that sovereign immunity makes the claim futile.

1 Cohen previously brought a Nevada whistleblower retaliation claim against DHHS before
2 a Nevada State Personnel Commission hearing officer. ECF No. 42 at 16. The statute allows
3 state employees who believe they experienced retaliation for having disclosed information
4 concerning improper government action to dispute the adverse action. Nev. Rev. Stat.
5 § 281.641(1). The employee must state with particularity the facts and circumstances of the
6 disclosure of improper governmental action and the retaliation taken against them. *Id.*
7 § 281.641(1)(a)-(b). In Cohen's agency proceeding, the hearing officer granted DHHS's motion
8 to dismiss because Cohen had not provided documents that "set forth, with particularity" that any
9 disclosure of improper governmental action occurred, or the nature of any retaliation taken
10 against him. ECF No. 42 at 2-3. The hearing officer also noted that Cohen had not included the
11 complaints he made to the EEOC or Nevada Equal Rights Commission (NERC) so there was no
12 documentation that DHHS was aware of Cohen's complaints during his employment. *Id.* at 3.
13 An employee can appeal the hearing officer's determination to a Nevada district court, but
14 nothing before me indicates that Cohen did this. Nev. Rev. Stat. § 233B.130.

15 The defendants argue that this federal case is an improper attempt to appeal the Personnel
16 Commission hearing officer's decision. They point to Cohen's statements that he made "similar
17 allegations before the State's Hearings Division" and that he "effectively seeks judicial review
18 of" the decision to dismiss his claim there. ECF Nos. 19 at 7; 28 at 6. They further argue that the
19 administrative decision precludes Cohen's § 1983 claims in federal court. Cohen responds that
20 he only referenced the state administrative dismissal to inform this court that "any review request
21 of that decision would have been futile due to the exemption clause which exists, specific to
22 Medicaid." ECF No. 46 at 2.

1 In considering Cohen's clarification in his brief, Cohen is not asking for a review of the
2 hearing officer's dismissal. At this stage, it is unclear whether the state hearing officer's
3 dismissal of Cohen's retaliation whistleblower claim meets the elements of res judicata. The
4 motion to dismiss did not go through the elements and how they apply here, so there was no
5 discussion on whether the issues are identical or whether there was a final judgment on the
6 merits. More information may be necessary to make such a determination.¹¹ Because it is not
7 apparent whether res judicata would bar this suit, it is not clear that amendment of Cohen's
8 remaining claims would be futile on that basis.

9 3. Qualified Immunity

10 An official is entitled to qualified immunity in their individual capacity unless the
11 violation of a constitutional right was "clearly established" at the time of the official's alleged
12 misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citing *Saucier v. Katz*, 533 U.S.
13 194, 198 (2001)). Qualified immunity protects state officials, not state entities. *See Harlow v.*
14 *Fitzgerald*, 457 U.S. 800, 817–18 (1982). There are no state officials currently in this suit. To
15 the extent that the defendants intended to argue that amendment to include state officials would
16 be futile because any official would be entitled to qualified immunity, I decline to decide that at
17 this stage. Qualified immunity is an affirmative defense that the government official has the
18 burden of establishing. *Frudden v. Pilling*, 877 F.3d 821, 831 (9th Cir. 2017). Without any
19 officials in this suit and without a clear picture of the claims, it is premature to decide the issue.

21 ¹¹ In assessing this argument, I did not consider the additional documentation about the
22 administrative hearing that Cohen provided in his reply to the expedited briefing and trial
23 schedule motion. ECF Nos. 59-1 at 6-23; 59-2 at 1-9. The documents were not provided in the
context of the motion to dismiss or motion for leave to amend, they were presented for the first
time in a reply brief, and no party has presented an argument as to why it would be proper to
consider them.

1 4. Failure to State a Claim

2 Even if Cohen had addressed the sovereign immunity issues, amendment with the fifth
3 amended complaint would be futile because Cohen failed to sufficiently allege his claims to meet
4 the required pleading standards. But it is not clear that Cohen would be unable to remedy these
5 pleading deficiencies. So I grant leave to amend the ADA, due process/equal protection, and
6 Rehabilitation Act claims.¹²

7 *i. Title I of the ADA*

8 Under Title I of the ADA, an employer shall not discriminate against a “qualified
9 individual with a disability because of the disability of such individual” in the context of their
10 employment. 42 U.S.C. § 12112(a). Discrimination is defined to include failing to provide
11 reasonable accommodations to an “otherwise qualified individual with a disability” and
12 excluding or denying equal jobs or benefits to qualified individuals with disabilities. *Id.*
13 § 12112(b)(4), (5)(A). Employers are also required to engage in the “interactive process” to
14 explore possible accommodations in good faith. *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d
15 1128, 1137 (9th Cir. 2001). For an unlawful discharge claim, Cohen must allege “(1) that he is a
16 disabled person within the meaning of the ADA; (2) that he is qualified, that is with or without
17 reasonable accommodation (which he must describe), he is able to perform the essential
18 functions of the job; and (3) that the employer terminated him because of his disability.” *Cooper*
19 *v. Neiman Marcus Grp.*, 125 F.3d 786, 790 (9th Cir. 1997), *as amended on denial of reh’g and*
20

21 ¹² The defendants argue that all of Cohen’s claims are barred by the law-of-the-case doctrine.
22 That doctrine does not apply to the review of amended complaints. *Askins v. U.S. Dep’t of*
23 *Homeland Sec.*, 899 F.3d 1035, 1043 (9th Cir. 2018). If I determine that “the amended
complaint is substantially the same as the initial complaint,” then I am “free to follow the same
reasoning and hold that the amended claims suffer from the same legal insufficiencies.” *Id.* But I
am not “bound by any law of the case.” *Id.*

1 *reh'g en banc* (Dec. 4, 1997) (internal quotations and citations omitted). A plaintiff is required
2 to exhaust his remedies by filing a charge with the EEOC prior to filing a claim in federal court.
3 *See* 42 U.S.C. § 2000e–5(e), (f)(1).

4 The defendants argue that Cohen has failed to exhaust his remedies because he did not
5 attach his EEOC letter to the fourth amended complaint, that he has not alleged his autism
6 disorder adversely affects any major life activities, and that he has failed to allege how he was
7 discriminated against because of his disability. Cohen argues that he attached the EEOC letter to
8 his fifth amended complaint, that he has alleged autism affects the major life activity of
9 communication, and that he was fired after telling his employer about his disability.

10 If Cohen chooses to amend his complaint, he must attach the EEOC right to sue letter to
11 his amended complaint. Even though Cohen attached the letter to his proposed fifth amended
12 complaint, he had previously failed to attach the letter to some of his amended complaints even
13 though both Judge Foley and Judge Youchah had instructed him to do so. ECF Nos. 4 at 3; 9 at
14 3. If Cohen does not include the EEOC right to sue letter again, I will dismiss the Title I ADA
15 claim without leave to amend.

16 Cohen has adequately pleaded that his autism disorder adversely affects his major life
17 activities. A disability is a physical or mental impairment that substantially limits one or more
18 major life activities. 42 U.S.C. §§ 12102(1)(A)–(C). Major life activities include
19 “communicating.” 29 C.F.R. § 1630.2(i)(1)(i). The relevant ADA regulations include “autism”
20 among its examples of types of impairments that substantially limit major life activities. *Id.*
21 § 1630.2(j)(3)(iii). Cohen has identified autism as his disability and has alleged it affects his
22 communication. ECF No. 28 at 5 (“delays in the ability to process verbal information”); *id.* at 22
23 (explaining in his accommodation request why he needs a tape recorder for meetings).

1 Cohen has not sufficiently alleged that he suffered an adverse employment decision
2 because of his disability, a pleading deficiency that was already pointed out to him in a previous
3 screening order. ECF No. 4 at 4. Cohen alleges that he informed DHCFP of his disability and
4 that he was fired approximately two months later. ECF No. 28 at 38. The fifth amended
5 complaint contends that DHCFP fired Cohen “while other employees similarly situated had
6 reasonable accommodations negotiated in good faith and/or were retained subsequent to that
7 date. By failing to negotiate in good faith and/or retain Petitioner, both disparate treatment and
8 impact discrimination occurred.” *Id.* at 6. Cohen has not alleged facts to support his legal
9 conclusion that he was fired because of his disability.

10 Construing Cohen’s proposed fifth amended complaint broadly, his claim is not
11 necessarily based on DHCFP treating him differently because of his disability but rather because
12 DHCFP failed to accommodate him in denying him the tape recorder for meetings and failed to
13 engage in the interactive process. But even with the claim framed that way, Cohen must at least
14 allege that he was fired for performance inadequacies caused by his disability and that the
15 accommodations would have addressed those inadequacies. *Humphrey*, 239 F.3d at 1139-40.
16 Cohen has not done so in his proposed fifth amended complaint. That complaint, which includes
17 an internal memorandum from his supervisor and the notes from his EEOC intake, explains he
18 was fired for not completing jobs within his job scope and telling other staff how to handle their
19 duties. ECF No. 28 at 19, 31. Cohen has not alleged any facts that these were pretextual reasons
20 nor has he alleged that the lack of a tape recorder is what caused these performance
21 inadequacies. Therefore, amendment with the fifth amended complaint for the Title I ADA
22 claim would be futile. However, if Cohen can remedy this pleading deficiency, and address the
23 sovereign immunity issue, I grant him leave to amend this claim with a new complaint.

1 ii. *Due Process/Equal Protection*

2 The Fourteenth Amendment prohibits the government from “depriving any person of life,
3 liberty, or property, without due process of law; nor deny to any person within its jurisdiction the
4 equal protection of the laws.” U.S. Const. amend. XIV § 1. The Fourteenth Amendment protects
5 both procedural and substantive due process rights. A procedural due process claim challenges
6 the government for depriving someone of life, liberty, or property without implementing
7 sufficient procedures, such as holding a hearing. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).
8 To determine if additional procedures were necessary, courts must consider: “(1) the private
9 interest affected; (2) the risk of erroneous deprivation through the procedures used, and the value
10 of additional procedural safeguards; and (3) the government’s interest, including the burdens of
11 additional procedural requirements.” *Shinault v. Hawks*, 782 F.3d 1053, 1057 (9th Cir. 2015)
12 (citing *Mathews*, 424 U.S. at 335).

13 A substantive due process claim challenges the government for depriving a person of life,
14 liberty, or property without an adequate reason. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 728
15 (1998). The Fourteenth Amendment also provides individuals equal protection under the law by
16 prohibiting the government from treating similarly situated individuals differently without
17 adequate justification. *Brown v. Bd. of Ed. of Topeka.*, 347 U.S. 483, 495 (1954).

18 For both substantive due process and equal protection claims, the government need only
19 have a rational basis for its actions when the alleged conduct does not involve a fundamental
20 right or a suspect class. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Under the rational
21 basis test, a government action is upheld if it is “rationally related to legitimate government
22 interests.” *Id.* at 728. Individuals with disabilities are not part of a suspect class so the rational
23 basis test applies. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

1 It is unclear what Cohen's due process claim is based on. Cohen generally references the
2 Fourteenth Amendment in his fifth amended complaint and states that due process requires an
3 opportunity to be heard. ECF No. 28 at 8. This implies that it is a procedural due process claim
4 but Cohen has not identified what government actions lacked sufficient procedures or what
5 protected interest the government deprived him of.

6 Cohen also alleges that his "due process is affected" by Nevada Revised Statutes
7 § 284.385(2), which creates a procedural distinction between permanent and probationary
8 employees. *Id.* at 7. He further alleges his due process rights are "affected" because
9 § 284.385(4) prohibits employers from dismissing someone for their religion, race, sexual
10 orientation, or gender but does not include disability. *Id.* at 7-8. It is unclear what he means by
11 "affected." To the extent that Cohen is alleging that the Nevada statutes violate his substantive
12 due process or equal protection rights, he has failed to allege any facts or make any arguments
13 for why the distinctions fail to meet the low bar set by the rational basis test. If Cohen seeks to
14 amend this claim, he must clearly set out the legal basis for his due process and equal protection
15 claim and identify facts that support it.

16 *iii. Rehabilitation Act*

17 The Rehabilitation Act of 1973 was passed to help individuals with disabilities "to
18 maximize employment, economic self-sufficiency, independence, and inclusion and integration
19 into society." 29 U.S.C. § 701(b). Like the ADA, Section 504 of the Rehabilitation Act prohibits
20 an individual from being discriminated against "solely by reason" of his disability "under any
21 program or activity receiving federal financial assistance." *Id.* § 794(a). Section 102 of the
22 Rehabilitation Act sets out a system for providing vocational rehabilitation services to
23 individuals with disabilities to assist them in securing, retaining, advancing, and regaining

1 employment. 29 U.S.C. § 722. DETR is the entity responsible for this program in Nevada. The
2 Code of Federal Regulations related to Section 102 outlines the specific circumstances in which
3 an individual's vocational rehabilitation services case can be closed. 34 C.F.R. § 361.56.

4 Although Cohen references the Rehabilitation Act throughout his complaint, it is unclear
5 what provisions he bases his claim on. He cites to 34 C.F.R. § 361.56, which suggests he is
6 alleging that DETR violated that provision when it closed his case prematurely. But he has not
7 identified a private right of action for him to pursue it. The Rehabilitation Act requires an
8 individual to first challenge a vocational rehabilitation services case decision in a state
9 administrative hearing before he can bring it to state court. 29 U.S.C. § 722(c)(5)(J). There is no
10 indication that Cohen has done this. If this is the basis of his claim, he must state it clearly in his
11 amended complaint and attach documentation showing that he challenged it through the proper
12 channels. To the extent he intended to allege a Section 504 violation, he has not sufficiently
13 alleged facts to support it and has not identified the claim in a way that would give fair notice to
14 the defendants. Because it is not clear that amendment would be futile, I grant Cohen leave to
15 amend this claim.

16 5. Service of Process

17 If Cohen still intends to maintain claims against DHHS, he must properly serve it with
18 process. Rule 4 requires that service upon a state government must be made by "(A) delivering a
19 copy of the summons and of the complaint to its chief executive officer; or (B) serving a copy of
20 each in the manner prescribed by that state's law for serving a summons or like process on such a
21 defendant." Fed. R. Civ. P. 4(j)(2). Nevada law requires service of process on the attorney
22 general and the person serving in "the office of administrative head of the named agency." Nev.
23 Rev. Stat. § 41.031(2). Cohen has served the attorney general but has not served the head of

DHHS. Instead, Cohen served the Las Vegas District Office of DHCFF. Contrary to Cohen's arguments otherwise, the agency is DHHS, not DHCFF so the head of DHHS must be served. *See Nev. Rev. Stat. § 232.300(2)(e), (3).* DHCFF is a division within DHHS. *Id.*

Cohen has been given multiple extensions to the proof of service deadline already and has been warned that failure to properly serve a party may result in dismissal under Rule 4(m). ECF Nos. 18 at 3-4; 25 at 5. I will give Cohen one last chance to properly serve DHHS. If Cohen fails to do so, I will dismiss DHHS from this action without prejudice.

6. Conclusion

Because Cohen's proposed fifth amended complaint contains several deficiencies, proceeding with it as is would be futile. But if Cohen can remedy the deficiencies I have identified, I grant him leave to amend his ADA, Rehabilitation Act, and due process/equal protection claims. I caution Cohen that a failure to remedy these deficiencies may result in dismissal without leave to amend. Cohen's new complaint should be titled "Fifth Amended Complaint."

D. Motion for Expedited Briefing and/or Trial Schedule (ECF No. 53)

Cohen moves for expedited briefing and trial schedule because he is concerned that Nevada's damages cap will limit his damages for this case. He argues that the case is not complex and that most of the discoverable information has been exchanged. The defendants respond that there is no reason to expedite, and that discovery has been stayed because of the pending motions. They also argue that the damages cap does not apply to federal claims.

Because I grant the defendants' motion to strike the fourth amended complaint, Cohen has no operative complaint. Additionally, the damages cap does not apply to federal claims. *Honghui Deng v. Nevada ex rel. Bd. of Regents for Nev. Sys. of Higher Educ.*, No. 2:17-cv-

1 03019-APG-VCF, 2020 WL 1470866, at *4 (D. Nev. Mar. 25, 2020). Cohen cannot maintain
2 his state law claims because of sovereign immunity so the cap is irrelevant as to them. Seeing no
3 basis to expedite the briefing or trial schedule, I deny Cohen's motion.

4 **E. Report and Recommendation on Motion to Amend (ECF No. 60)**

5 Judge Youchah issued a report and recommendation on Cohen's motion for leave to
6 amend with his proposed fifth amended complaint. ECF No. 60. She recommended I deny leave
7 to amend and that I treat the second amended complaint as the operative complaint. Given my
8 decisions in this order, her report and recommendation is moot.

9 **III. CONCLUSION**

10 I THEREFORE ORDER that plaintiff Steven Cohen's motions for status check (ECF
11 Nos. 52, 54) are **DENIED as moot.**

12 I FURTHER ORDER that the motion to dismiss or strike filed by defendants Department
13 of Administration – Division of Human Resource Management and Department of Employment,
14 Training and Rehabilitation – Bureau of Vocational Rehabilitation (ECF No. 26) is **GRANTED**
15 **in part.** I order the clerk of the court to strike ECF No. 19.

16 I FURTHER ORDER that defendant Department of Health and Human Services –
17 Division of Health Care Financing and Policy's motion to dismiss (ECF No. 42) is **DENIED as**
18 **moot.**

19 I FURTHER ORDER that plaintiff Steven Cohen's motion for leave to amend (ECF No.
20 30) is **DENIED.**

21 I FURTHER ORDER that plaintiff Steven Cohen may file a new amended complaint,
22 titled "Fifth Amended Complaint." If he fails to file an amended complaint by **May 21, 2021**,
23

1 this action will be dismissed with prejudice. This order gives Cohen leave to amend only the
2 claims as set forth in this order and does not grant leave to add new claims.

3 I FURTHER ORDER that the deadline to properly serve defendant Department of Health
4 and Human Services – Division of Health Care Financing and Policy is extended to **June 1,**
5 **2021.** If Cohen fails to properly serve that defendant by that deadline, I will dismiss the claims
6 against it without prejudice.

7 I FURTHER ORDER that plaintiff Steven Cohen's motion for expedited briefing and/or
8 trial schedule (**ECF No. 53**) is **DENIED.**

9 I FURTHER ORDER that Judge Youchah's report and recommendation on Steven
10 Cohen's motion for leave to amend (**ECF No. 60**) is **moot.** There is no need to file an objection
11 to that document.

12 DATED this 19th day of April, 2021.



14 ANDREW P. GORDON
15 UNITED STATES DISTRICT JUDGE
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